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MICHAEL RODAK, JR.

Supreme Court of the United States

October Term, 1972

No. 72-1095

JAMES LEE STOCKWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. .....

JAMES LEE STOCKWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, James Lee Stockwell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit entered in this proceeding on January 11, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 11, 1973. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Supreme Court Rule 22(2).

QUESTIONS PRESENTED

1. **Whether the judgment of the Court of Appeals to remand petitioner's case for re-sentencing violated petitioner's Fifth Amendment right to due process under the United States Constitution and his Eighth Amendment right not to be subjected to cruel and unusual punishment.**

2. **Whether the method by which the government, with the cooperation of the trial court, obtained the testimony of the two chief government witnesses deprived petitioner of due process of law under the Fifth Amendment to the United States Constitution.**

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution

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provides, in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . . "

The Eighth Amendment to the United States Constitution provides, in relevant part:

> "Excessive bail shall not be required . . . *nor cruel and unusual punishments inflicted.*"

STATEMENT OF THE CASE

A six-count indictment charged petitioner and Jan Bruce Benken with counterfeiting offenses as follows: **Count 1**, conspiracy to commit counterfeiting with unindicted co-conspirators Gerald Frank Shaw, Kenneth Alvin Jones, James Melvin Armstrong, Clarence Oscar Forrest, Michael Ben Tomlin, Bobby Lee Evans, Judith Guilmette, David Wolfe, and David Gorwitz (18 U.S.C. Section 371); **Count 2**, possession of counterfeit notes (18 U.S.C. Section 472); and **Counts 3 through 6**, delivery of counterfeit notes to certain unindicted co-conspirators (18 U.S.C. Section 473) (C.T.[1] 1-9).

Petitioner and Benken entered pleas of not guilty and a jury trial began. (R.T.[2] 293-568.) The court declared a mistrial because of references by the prosecution to evidence that the court had previously ruled inadmissible. (R.T. 569.)

When the case was called for a second trial, counsel

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1. As used herein "C.T." refers to Clerk's Transcript

2. As used herein "R.T." refers to Reporter's Transcript.

for both defendants, the prosecutor and the judge had a conference in chambers. Stephen Miller, counsel for Benken, pointed out that after the first trial Benken had been convicted in the state court of two counts of assault with a deadly weapon and one count of possession of explosives, and had been sentenced to three consecutive terms of two years to life. Miller told the judge that he had discussed the case with Benken's counsellor at Chino and had learned that there was a possibility of parole "in three years or more, and perhaps longer." (R.T. 582.) Miller pointed out that Benken "had a couple of arrests and no prior convictions" (R.T. 584), other than the state bombing convictions. Miller suggested a three-year sentence to run concurrently with the state sentences if Benken entered a guilty plea. (R.T. 586.) The government took no position on sentence, leaving it entirely to the court. (R.T. 487.) The judge then agreed, in view of the state sentences, to sentence Benken to a three-year term to run concurrently with the state sentence. (R.T. 587-88.)

The discussion then turned to the possibility of a guilty plea by petitioner. The prosecutor pointed out that petitioner had been convicted of mail fraud in another department of the court and that he had not yet been sentenced. (R.T. 588-89.) The judge then asked about the relative extent of participation in the counterfeiting offenses by petitioner as compared to Benken. The prosecutor answered: "Yes, I would say the guilt of it would be equal, your Honor." (R.T. 589.) Counsel for petitioner advised the judge that although petitioner, like Benken, had been arrested previously, he had no other convictions and that he was then working for a land development company in Sherman Oaks. (R.T. 590.)

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The following colloquy then took place:

"THE COURT: Well, I can tell you in advance, if he is convicted, about what he will get. I can give you some idea.

"MR. BUSBY: I am interested in some idea.

"THE COURT: In view of what has transpired in this case, I would say he would come off with no less than five years.

"MR. BUSBY: That is what you told me the last time.

"THE COURT: If he is convicted. I say not less, now. I don't know whether some of the judges have the intestinal fortitude to let the lawyers know these things. I don't know what is wrong with the Socratic method, which is open discussion of these things. It certainly wouldn't change my presentation of the case permitting you every defense that you are entitled to.

"MR. BUSBY: Absolutely, I understand that, sir.

"THE COURT: It is not going to make me presume that he is guilty.

"MR. BUSBY: I realize that.

"Also, I assume your position would be different in a plea situation.

"THE COURT: Well, I don't know.

"What does the government have in mind; anything on that?

"MR. WALTER: Again, your Honor, it is

entirely within your discretion. We take no position on the matter.

"THE COURT: A plea to one count?

"MR. BUSBY: Yes, sir.

"MR. MILLER: Yes, sir.

"THE COURT: My offhand reaction is three years. If you lose –

"MR. BUSBY: I –

"THE COURT: You are in a tough spot. If you lose you may get three or four more. It really puts a lawyer in sort of a tough predicament, doesn't it?" (R.T. 590-91.)

Petitioner decided to plead not guilty and to exercise his constitutional right to a jury trial. (R.T. 592.) Benken then pleaded guilty on Count 4 and was sentenced to three years imprisonment. (R.T. 601-02; C.T. 51.) This sentence was to be concurrent with the state sentence. (R.T. 594-97.) However, the court made it clear that the federal sentence was an independent three-year term, to be served even if Benken won a reversal on appeal of the state sentence. (R.T. 594-97.) The court later dismissed the remaining counts against Benken. (C.T. 62.)

Petitioner was tried and convicted on Counts 1-4 and 6.[3] (C.T. 61.) The trial judge sentenced petitioner to five years on Count 1 and seven years on each of Counts 2, 3, 4, and 6, all sentences to run concurrently. (R.T. 954-55; C.T. 66.) Thus, on Count 4, petitioner received a sentence four years longer than the sentence of Benken on the same count.

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3. The case did not go to the jury on Count 5.

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At the second trial the government called several of petitioner's alleged co-conspirators as witnesses. Kenneth Jones and Gerald Shaw, charged as unindicted co-conspirators (C.T. 1) were the two chief prosecution witnesses. Jones was arrested for his participation in the alleged conspiracy, was charged with four counterfeiting counts in a separate indictment with Shaw and Clarence Oscar Forrest (App.[4] at 18-23), first entered a plea of not guilty (App. at 26), and then pleaded guilty to Count 1 (conspiracy to commit counterfeiting) on May 25, 1971 (App. at 28; R.T. 719-20). Jones testified for the government on January 18, 1972, nearly eight months after his guilty plea, but had not yet been sentenced (R.T. 720-22).

Shaw was arrested in February, 1971, for his participation in the alleged scheme (R.T. 682). He was charged with three counterfeiting counts (App. at 18-21, 23), entered not guilty pleas (App. at 26) and then, with Jones, pleaded guilty to Count 1 (conspiracy to commit counterfeiting) on May 25, 1971 (App. at 28). He testified on January 18, 1972, but, like Jones, had not yet been sentenced, because his sentencing was continued a number of times at the request of his attorney and the prosecutor. (R.T. 682-84.)

The history of the cases of Jones and Shaw, and the sentences they finally received after testifying for the government, are discussed in detail in argument number 2,

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4. As used herein "App." refers to the Appendix to petitioner's Opening Brief on Appeal, submitted to aid the Court of Appeals in taking judicial notice of certain federal district court and state court records pertaining to other cases involving Gerald Shaw, Kenneth Jones, Bobby Evans, Judith Guilmette, Michael Tomlin and David Gorwitz. Said Appendix is part of the record on appeal and will be certified and transmitted to this Court at petitioner's request. Petitioner's request will be directed to the clerk of the Court of Appeals pursuant to Rule 21 of the Rules of the Supreme Court, and will be made prior to action on this petition by this Court.

below. Their pleas of guilty were entered before Judge Carr, the presiding judge at petitioner's trial. Judge Carr also presided over the sentencing phase of Shaw's and Jones' cases.

Evidence of the alleged conspiracy to commit counterfeiting, introduced at petitioner's second trial, consisted of the testimony of Jones and Shaw.

Shaw testified that he had previously been convicted of counterfeiting in 1966 and 1968. (R.T. 675.) He was released from prison in June, 1970, and he and Jones met in September, 1970. (R.T. 678.) Each tried to minimize his participation in the alleged scheme. Shaw testified that Jones came to him, said he was in trouble, and asked Shaw's help in obtaining some money. Shaw said he did not want to get involved. (R.T. 663.) On the other hand, Jones testified that Shaw first called him and that Shaw first brought up the idea of acquiring counterfeiting plates. (R.T. 724-25, 728-29.) Jones had been convicted on an unspecified state charge[5] and was to be sentenced on October 2, 1970. He said he had a meeting with Benken, petitioner, and James Armstrong in which Benken and petitioner said they knew someone with some "power" in the District Attorney's office and they could help him with his case. Jones was to give Benken and petitioner his 1970 Cadillac and to acquire for them counterfeiting plates for the manufacture of $20.00 bills. (R.T. 688-89.)

Shaw agreed to help Jones. He made the counterfeit plates and gave them to Jones. (R.T. 664-66, 730-31, 736.) Jones gave one side of a plate to Armstrong so he could have

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5. Explained further in argument number 2, below.

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an expert look at it. On October 2, before he went to court for sentencing, Jones gave Benken the ownership certificate for his Cadillac. (R.T. 690.)

Jones then appeared in court for sentencing on October 2. In court he met an attorney named David Kwan, who, along with another attorney, represented Jones at the hearing. Jones did not pay Kwan for his services. He testified that he was not sentenced on October 2, but the record does not show the final disposition of the case. (R.T. 692-93.)

When Jones left the courthouse he found Benken and petitioner waiting outside for him. They drove to a coffee shop where Benken said, "Well, you didn't think we could really do it, did you?" (R.T. 694.) Petitioner then said that Jones was a member of an organization whether he liked it or not and told Jones to get the counterfeiting plates so they could start printing right away. That same afternoon, Jones gave the plates to Armstrong. He had no other personal meetings with petitioner. (R.T. 695-98.)

A few days after October 2, Jones met with Benken, who said that another $5,000.00 was required to get Jones out of the state case. Jones paid Benken $5,000.00 four or five days later. (R.T. 699-700.)

Jones later received a phone call from someone who identified himself as "Casino."[6] The caller said that the person who had arranged to do the printing was not going to do it and another printer had to be found. Benken, Armstrong, and Jones then met at a restaurant and Benken

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6. Petitioner was known to Jones by the name "Casino."

said that the printing had to be done right away. Benken then left the table, called Jones to a telephone, and Jones spoke to "Casino," who said Jones would have to do the printing. (R.T. 701-03.) Jones then contacted Shaw, they bought a printing press, Armstrong and Clarence Forrest obtained the paper, and they printed abut $150,000.00 worth of counterfeit notes. (R.T. 670-74, 704-09.) Benken and petitioner were not present during the printing process. (R.T. 674.)

Armstrong told Jones to deliver $40,000.00 of the notes to a place called the Pink Panther. Jones went to the Pink Panther, met Benken and petitioner there, told them he had the money, and then followed them in his car to a place in the country. Jones there told Benken and petitioner he did not have the money but that Armstrong would deliver the money after Jones called him with instructions. Jones then called Armstrong and told him Benken and petitioner wanted Armstrong to bring the money to the Topper Club in 30 minutes. Jones drove to the Topper Club and waited about thirty minutes until Armstrong arrived and said that Benken and petitioner had received the money. (R.T. 711-16.) Armstrong and Forrest later took the remainder of the money. (R.T. 718.)

Shaw never met or talked with petitioner. He first saw petitioner when he appeared for the trial of this case. (R.T. 679.) Jones was the only witness who testified that petitioner was involved in the initial manufacture and distribution of the money.

The testimony of the prosecution witnesses other than Jones and Shaw implicated petitioner only in the distribution or passing of counterfeit bills–the same activity in which

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the witnesses themselves were engaged and for which each of them, except Bobby Evans, received probation.

Petitioner did not testify and offered no evidence.

REASONS FOR GRANTING THE WRIT

1. **The Judgment Of The Court Of Appeals To Remand Petitioner's Case For Re-Sentencing Does Not Satisfy The Constitutional Guarantees Of Due Process And The Eighth Amendment.**

The Court of Appeals inferred from the evidence that the trial court may have imposed four additional years of punishment on petitioner as a penalty for his exercise of the constitutional rights not to plead guilty and to a jury trial. (Opinion of the Court of Appeals, Appendix pp. 2 - 4.) However, the court also said (Appendix p. 3):

> "While we do not believe that the experienced trial judge actually punished the defendant for standing trial, the record leaves unrebutted the inference drawn by the defendant."

As an apparent consequence of this *belief* in the legitimate motivations of the trial judge, the court remanded the case for re-sentencing without any recommendation or determination of the punishment to be imposed. This is clearly an inadequate remedy, both practically and constitutionally. The remedy is impractical in that the trial judge will be confronted with the choice of reducing petitioner's sentence, and thereby admitting a constitutional violation, or imposing the same penalty and declaring for the record that the additional four years was not imposed to punish petitioner for

going to trial. The latter course is inevitable. The proper remedy would be either (a) to reduce the sentence to three years, (b) invalidate the four-year additional sentence and remand for re-sentence of three years, or (c) remand for re-sentence by another judge. The latter course is suggested in *Mayberry v. Pennsylvania,* 400 U.S. 455, 465-66, 91 S. Ct. 499, 27 L. Ed. 2d 532, 540 (1971). There, a defendant in a criminal contempt proceeding appealed from an 11-to-22-year sentence imposed by the trial judge, whom defendant vilified during the course of the trial. This Court vacated the judgment and remanded the case to another judge. The Court found the slandered trial judge could not be expected to maintain that calm detachment necessary for fair adjudication. Consequently, the Court held that due process could only be satisfied by remanding the case to a judge who represented the "impersonal authority of the law." (*Id.* at 466, 27 L. Ed. 2d at 540.)

Judge Carr has become personally involved in the disposition of petitioner's sentence. To reduce petitioner's sentence would necessarily be an admission of his participation in a violation of petitioner's constitutional rights. At the very least, due process requires that petitioner's case be remanded to an impartial judge for re-sentencing. (*Mayberry v. Pennsylvania, supra.*)

Additionally, the constitutional guarantee of due process prohibits discriminatory enforcement of penal laws. (*Yick Wo v. Hopkins,* 118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L. Ed. 220, 227 (1886); *Cochran v. Kansas,* 316 U.S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453 (1942); *Dowd v. United States ex rel Cook,* 340 U.S. 206, 71 S. Ct. 262, 95 L. Ed. 215 (1951); *United States v. Steel,* 461 F.2d 1148 (9th Cir.

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1972); *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960).) In the present case, Benken, co-conspirator with petitioner, received only three years on Count 4. Petitioner received seven years on the same count. The prosecutor admitted that Benken was at least an equal participant with petitioner in the alleged crime. Benken's prior conviction was for assault with a deadly weapon and possession of explosives, far more serious offenses than petitioner's prior conviction for mail fraud by the use of credit cards. Petitioner would have received three years if he had pleaded guilty. The only difference between Benken and petitioner was petitioner's insistence on a jury trial. The Court of Appeals deemed itself compelled to recognize the unrebutted inference that Judge Carr had imposed the four additional years solely because petitioner had exercised his constitutional rights. Thus, the evidence strongly suggests that petitioner was selectively sentenced because he exercised his constitutional right to a jury trial. Such discrimination is invidious and a violation of due process. (*Cf. United States v. Steel, supra.*) The appropriate remedy to be invoked is the elimination of the four-year period from petitioner's sentence. Under such circumstances the reviewing courts may, and indeed should, interfere with the sentencing court's discretion. (See *Snowden v. Smith*, 413 F.2d 94, 96 (7th Cir. 1969).)

The Eighth Amendment protection against the imposition of cruel and unusual punishments prohibits the infliction of a sentence upon petitioner in excess of three years. It is settled that it is "possible for the length of the sentence to be so disproportionate to the offense as to fall within the [Eighth Amendment] inhibition" against cruel and unusual punishments. (*Black v. United States*, 269 F.2d 38, 43 (9th

Cir. 1959).) Petitioner contends that where the court has decided that three years is an appropriate sentence for an offense, a seven-year sentence for that offense, imposed for unconstitutional reasons, is disproportionate.

In *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962), the Supreme Court held violative of the Eighth Amendment the punishment of the mere status of narcotic addiction. The Court reasoned:

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a cold." (370 U.S. at 667, 8 L. Ed. 2d at 763.)

If it is cruel and unusual to punish a man because he is a narcotic addict, it is at least as cruel and unusual to punish a man because he exercised his constitutional rights. Chief Judge Harris, of the Northern District of California, in *Jordan v. Fitzharris*, 357 F. Supp. 674, 679 (N.D. Cal. 1966), identified three elements of a test for cruel and unusual punishments: (1) under all the circumstances, is the punishment of such character as to shock general conscience or to be intolerable to fundamental fairness, such judgment to be made in the light of developing concepts of elemental decency; (2) is the punishment greatly disproportionate to the offense for which it is imposed; (3) does the punishment, although applied in pursuit of a legitimate aim, go beyond what is necessary to achieve that aim. This case passes all three tests: (1) punishing a man for invoking his constitutional rights shocks the conscience

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in the light of our developing standards of decency; (2) the punishment is disproportionate to the offense to the extent that it is imposed not for the offense but for accepting constitutional protections; (3) finally, punishing the defendant for exercising constitutional rights is not a legitimate aim of punishment.

It is unthinkable that any enlightened, constitutional government would tolerate the punishment of its citizens for accepting the promises of their constitution. This Court's statement in *Trop v. Dulles*, 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630, 642 (1958), is particularly appropriate:

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this right be exercised within the limits of civilized standards."

(See also Mosk, *The Eighth Amendment Rediscovered*, 1 Loyola L. Rev. 4 (1968).)

In light of the unrebutted inference that the four-year additional sentence was imposed upon petitioner because he elected to exercise his constitutional right to stand trial, the four-year period should be set aside as cruel and unusual punishment.

Conclusion

The judgment of the Court of Appeals to remand petitioner's case for re-sentencing does not secure for petitioner his Fifth Amendment right to due process nor his Eighth Amendment right not to be subjected to cruel and unusual punishment. The judgment should be modified to eliminate the four-year additional period. (*United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960).) If this remedy should

be deemed not to be required, then at the very least due process requires that re-sentencing be conducted by another judge upon remand. (*Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66, 91 S. Ct. 499, 27 L. Ed. 2d 532, 540 (1971).)

2. The Method By Which The Government, With The Cooperation Of The Trial Court, Obtained The Testimony Of The Two Chief Government Witnesses Deprived Petitioner Of Due Process Of Law.

Gerald Shaw and Kenneth Jones were the two chief witnesses for the government. Their testimony alone pointed to petitioner and Benken as the originators and planners of the alleged counterfeiting scheme. Their testimony was given under the pervasive influence of subsequent imposition of sentence in their own cases by Judge Carr, the same judge conducting petitioner's trial.

Following is a chronological summary of the history and background of the cases of Shaw and Jones and the "sentences" they finally received as prizes for their performance on the witness stand.

Gerald Shaw

March 16, 1966: Shaw was indicted (Case No. 35930) in the federal court on four counterfeiting counts. (App. at 1-4.) The bail information form indicates that he had no prior criminal record and that he was arrested in possession of eighty-five $20.00 ($1,700 total) counterfeit notes in his vehicle. (App. at 5.)

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April 26, 1966: Shaw pleaded guilty to Counts 1 (making counterfeit money) and 4 (possession of counterfeit money) and was sentenced as follows: Count 1, imprisonment for 2 years suspended on condition he serve 180 days in jail and placed on probation for five years. (App. at 6-7.) Thus, for a *first offense*, he was required to serve six months in jail and a five-year term of probation.

April 3, 1968: He was indicted (Case No. 1855) in the federal court on two counterfeiting counts. (App. at 11-13.) The file reflects that he was still on probation. (App. at 14.)

April 8, 1968: He pleaded not guilty on both counts. (App. at 15.)

May 7, 1968: He changes his plea to guilty on Count 2 (possession of counterfeit money). (App. at 16.)

June 3, 1968: He was sentenced to prison for one year, the sentence to run consecutively to the sentence received for the 1966 conviction in Case No. 35930. (App. at 17.)

July 8, 1968: A hearing on a petition to revoke Shaw's probation in the 1966 case (No. 35930) because of his conviction in the 1968 case (No. 1855) was held. Shaw admitted the violation and was sentenced as follows:

(a) The probation previously granted on Count 1 was revoked and he was sentenced to prison for the remainder of the two-year term (one and one-half years, since he had served six months), and the Board of Parole was given the power to determine parole eligibility under 18 U.S.C. Section 4208(a)(2). The sentence was to commence after service of the sentence on Count 4.

(b) The probation previously granted on Count 4 was revoked and he was sentenced to prison for 180 days, to run consecutively to the sentence on Count 1.

(c) The sentences on each of Counts 1 and 4 were to run consecutively to the one-year sentence imposed in the 1968 case (No. 1855). (App. at 8-10.)

Thus, for these two offenses, Shaw received a total sentence of three and one-half years in prison or jail. The last three years of the sentence began on June 3, 1968.

June, 1970: Shaw testified in the present case that he was released from prison at this time. (R.T. 678.) Thus, he served a total of about two and one-half years (the first six months and then the additional two years).

September, 1970: Shaw met Jones about three months after his release from prison and began planning a resumption of counterfeiting activities. (R.T. 678-81.)

February, 1971: He was arrested on the present offenses (R.T. 684) and was indicted on three counts. (App. at 18-21, 23.) He was apparently still on parole at that time. He was arraigned on February 11, 1971. (App. at 24.)

March 22, 1971: Shaw's case was assigned to Judge Charles Carr, the trial judge in petitioner's case. Shaw entered not-guilty pleas. (App. at 25-26.)

March 29, 1971: The case was set for jury trial on May 25, 1971. (App. at 27.)

May 25, 1971: Shaw changed his plea to guilty on Count 1 (conspiracy to commit counterfeiting) and the case was continued for sentence to June 21, 1971. (App. at 28.)

June 21, 1971: Judge Carr continued the case for sentencing to August 23, 1971, six days after petitioner's case was set for trial. (App. at 29; R.T. 253.)

August 17 and 18, 1971: Petitioner's first trial began on August 17 (R.T. 253), a mistrial was declared on August 18 (R.T. 569), and a second trial was scheduled for November 16,

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1971. (R.T. 572.)

August 23, 1971: Judge Carr continued Shaw's case to December 6, 1971, for sentencing. (App. at 30.)

Although the record does not reflect the reason, petitioner's case was not tried on November 16, 1971, but was continued to January 18, 1972. Therefore, petitioner's case had not been tried when Shaw came up for sentencing on December 6.

December 6, 1971: Judge Carr continued Shaw's case for sentencing to February 28, 1972, "on the request of Counsel for both sides." (App. at 31.) The prosecutor was John F. Walter, who represented the government in petitioner's case.

January 18 and 19, 1972: Petitioner's case was tried. Shaw testified on January 18. (R.T. 363.) Petitioner was found guilty on January 19 (C.T. 61) and Judge Carr ordered a probation investigation and report and continued the case for sentencing to March 13, 1972. (C.T. 64.)

February 28, 1972: Shaw and Jones appeared for sentencing but Judge Carr ordered a supplemental probation report "by request of counsel" and continued the case again for sentencing "at request of counsel," to March 13, 1972, the same day petitioner was to be sentenced. (App. at 32.)

March 13, 1972: The following proceedings occurred:

(a) Judge Carr sentenced petitioner to five years in prison on Count 1 and seven years on each of Counts 2, 3, 4, and 6. (R.T. 954-55; C.T. 66.)

(b) Judge Carr imposed and suspended execution of a five-year prison term for Shaw and Jones, *granted them probation for three years with no confinement*, and dismissed Counts 2, 3, and 4. (App. at 33-35.)

Kenneth Jones

Jones' prior criminal history is shown in Los Angeles Superior Court case number A-163000 and the probation report filed in that case. (App. at 67-87.)

1958 - 1964: He was arrested several times for various offenses such as contributing to the delinquency of a minor, suspicion of burglary, and traffic warrants. He was not convicted of any but the traffic offenses. (App. at 78.)

August 23, 1965: He was convicted of burglary (California Penal Code Section 459) and forgery (California Penal Code Section 470). He received a suspended sentence, three years' probation, and a $300.00 fine. The probation report indicates that Jones was a member of a group of ten to fifteen persons involved in burglaries, "a larger, more sophisticated operation that had been continuing for some time." His co-defendant was a man named Armstrong (possibly the unindicted co-conspirator in the present case). (App. at 78-79.)

July 14, 1969: Jones was arrested again for burglary. (App. at 79.) He and a co-defendant were charged with burglary (Penal Code Section 459) and receiving stolen property (Penal Code Section 496). (App. at 67-68.)

April 3, 1970: The probation officer prepared his report after Jones had been convicted of receiving stolen property. (App. at 76-87.) Following is the probation officer's evaluation and recommendation:

> "**Evaluation:**
>
> "This is the case of a 31-year-old defendant who has twice been convicted of illegally dealing with the property of others. It appears from the statements of the defendant's creditors that he is avoiding his debts and is a continuing

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menace to the property of others. It would appear that an accurate appraisal of the defendant's verbal statement would suggest that he feels remorse for having been caught, not for violating the law.

"It is felt that the public deserves protection from men such as the defendant and that this could best be accomplished by institutionalization, since the defendant was found to have become involved in the present offense while already on probation supervision as the result of attempting to pass stolen checks. While the defendant was on probation supervision he was ordered to remain away from a co-defendant in the stolen and forged checks matter, which he apparently did, but defendant was able to secure the cooperation of a co-defendant in this matter, a man on federal probation for possession of counterfeit money, and committed a similar offense. This would suggest that the defendant not only involves himself in illegal activities but has been successful in contributing to the delinquency of others.

"**Recommendation:**

"It is recommended that probation be revoked and sentence imposed in Case A-311690 and that probation be denied in Case Number A-163000." (App. at 86-87.)

September, 1970: Jones met with Shaw and began planning the counterfeiting program that led to the present case. (R.T. 678-81, 723-29.) The chronology relating to the

present case is the same as set forth above for Shaw.

June 7, 1971: Pursuant to stipulation, Jones' state conviction was reversed on the ground that it appeared from the record that he had not personally waived his right to a jury trial. (App. at 7.) The case was then set for trial in September, 1971 (App. at 71) and continued to March 6, 1972 (App. at 73-74).

March 6, 1972: Seven days before Jones was sentenced in the present case, the Superior Court sentenced him to six months in the county jail, suspended execution of that sentence, and placed him on probation for three years. The record does not show whether the United States Attorney was in contact with the state authorities but does show that on March 6, 1972, Jones waived probation referral, indicating that a sentence satisfactory to Jones had been arranged.

This chronology vividly illustrates that the influence on Shaw and Jones of prospective sentencing was maintained by the government and the trial judge throughout petitioner's trial. After Shaw and Jones changed their pleas to guilty and appeared for sentencing, their cases were continued by Judge Carr, at the request of counsel for defendants and for the government, four times. Each time it was continued to a date shortly after it was anticipated that petitioner's trial would be concluded. When petitioner's case was continued, Jones' and Shaw's cases were continued. They finally received exceptionally lenient sentences ten months after they pleaded guilty and on the same day petitioner was sentenced. The relationship of these continuances and the gift of lenient sentences to petitioner's case was no coincidence.

In its brief on appeal, the government ignored the obvious

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implications of the aforementioned facts, which were raised in petitioner's brief on appeal, and did not deny (1) that the prosecutor arranged with Shaw and Jones and their counsel that the sentencing of these defendants would be continued until after they testified against petitioner, (2) that the prosecutor promised to do what he could to obtain lenient sentences for the witnesses in return for their testimony, (3) that the sentencing of the witnesses was repeatedly continued so that they would not be sentenced until after they testified against petitioner, and (4) that they were finally given *undeservedly* lenient sentences because they testified against petitioner. Thus, the conclusion is inescapable that the government and trial judge granted extremely favorable treatment to Shaw and Jones *in exchange* for their testimony against petitioner.

Where a defendant pleads guilty to one count and promises to testify against his co-defendants in exchange for the prosecution's intercession in the sentencing phase of his case, he necessarily–and correctly–assumes that the sentence he finally receives will be measured by the extent of the benefit he confers on the government by his testimony. The tendency is inevitable that he will color, shade, and slant his testimony–if not flatly perjure himself–in favor of his benefactor, the prosecution. The judge reinforces this tendency by repeatedly granting motions to continue the sentencing until after the testimony, so that the government and the court can keep the sentence hanging over the witness' neck until he performs.

The procedure of continuing the sentencing of the witness until after he testifies has two vital effects, both of which are extremely advantageous to the prosecution

and at the same time destructive of the integrity of the fact-finding process and the defendant's right to a fair trial:

(1) It provides a strong incentive to the witness to give testimony that is either perjured or biased in the prosecution's favor. The witness remains subject to the power of the prosecution and court to seek and impose a heavy penalty if the witness does not cooperate. The witness knows that he must please the prosecutor to gain his favor. This means doing what he can to assure the defendant's conviction. Thus, the court and prosecutor have, in practical effect, joined forces to create what is undoubtedly in most cases an irresistible incentive for the witness to commit perjury or, at the very least, to slant his testimony in favor of the prosecution and against the defendant. In either case, the defendant's right to a fair trial has been nullified. For the witness the choice is clear: he can either serve a long prison term or he can help the prosecution. We would be naive, indeed, if we pretended not to know which choice he will invariably make.

(2) It deprives the jury of a fact essential to a proper evaluation of the witness' testimony. Because the witness is not sentenced until after the defendant's trial, the jury never knows what sentence he ultimately receives. Thus, the jury is deprived of a fact crucial to its determination of whether the witness was providing testimony for the government in exchange for favorable treatment at the sentencing stage of his case. If the jury knew that Shaw and Jones had received probation when, for example, a sentence of at least three years in prison was called for, it might well have viewed their testimony with

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great suspicion.

The practice by which the government and trial court create a powerful incentive for a witness to give false and biased testimony violates due process. It is not unlike that violation of due process which occurs where a conviction is obtained through the use of evidence known to be false by representatives of the government. (See *Napue v. Illinois,* 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217, 1221 (1959); *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791, 794, 98 A.L.R. 406 (1934); *Pyle v. Kansas,* 317 U.S. 213, 216, 63 S. Ct. 177, 87 L. Ed. 214, 215 (1942).) It is precisely because we cannot determine whether testimony, given under circumstances creating a strong likelihood of falsity, is in fact false or biased, that this practice should be prevented.

What is needed is a prophylactic rule to forbid the practice used here and to remove such influences that are likely to produce questionable testimony. This is not a novel suggestion. The federal courts have consistently insisted upon the establishment and strict observance of procedures designed to protect against violations of constitutional rights. (See *Miranda v. Arizona,* 384 U.S. 436, 458, 465-67, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 714, 718-19 (1966) [rule requiring advice of constitutional right to counsel and to remain silent is a necessary "protective device to dispel the compelling atmosphere of the interrogation" and to remove the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely"].)

The practice of continuing the sentencing of a witness until after he has testified and the trial is concluded deprives

the jury of a fact essential to the proper evaluation of his testimony. Such a practice by the government with the cooperation of the court is akin to the withholding of critical facts by the government, condemned in *Napue v. Illinois*, 360 U.S. 264, 270, 79 S. Ct. 1173, 3 L. Ed. 2d 1217, 1221-22 (1959).

In *Napue*, one of Napue's alleged accomplices, named Hamer, testified for the prosecution and stated that he had received no promise or consideration in return for his testimony. The prosecutor had in fact promised Hamer consideration but did not correct the testimony. After Napue was convicted, the prosecutor, then a private lawyer, filed a petition for writ of error coram nobis on behalf of Hamer, who had been convicted for his role in the crime. In the petition, the lawyer alleged that as prosecuting attorney he had promised Hamer that if he would testify against Napue, " '[a] recommendation' for a reduction of [the witness] sentence would be made and, if possible, effectuated." (360 U.S. at 266, 3 L. Ed. 2d at 1219.) The Court held that the failure of the lawyer, when he was a prosecutor, to correct the witness' testimony denied Napue due process of law. The significance of the case for present purposes is not the fact that the prosecutor knew the testimony was false but that the defendant was denied due process because the jury had not been made aware of facts critical to the evaluation of the witness' testimony. The Court explained:

> "Had the jury been apprised of the true facts, however, it might well have concluded that Hamer had fabricated testimony in order to curry the favor of the very representative of the state who was prosecuting the case in which Hamer

> was testifying, for Hamer might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration." (360 U.S. at 270, 3 L. Ed. 2d at 1221-22.)

In the present case, we can reasonably assume that the same kind of promise to try to obtain a favorable sentence was made to the witnesses. But even if no express promise was made, the arrangement that the cases would be continued until after the testimony was given held out the clear implication that the witnesses would receive a reward when they were finally sentenced. In either case the effect is the same: the witness is presented with a motive to give false or biased testimony. And because the sentencing was repeatedly continued, the court and prosecutor together deprived the jury of facts that were essential to a complete evaluation of the testimony of the witnesses. This practice is especially improper in light of the availability of a grant of immunity as the method of procuring testimony from co-conspirators. (18 U.S.C. Sections 6001-6003.) Such a procedure fixes the witness' status before he testifies and allows the jury to judge the possible motivations of the witness at that time. In this case the prosecutor should have obtained the testimony of Jones and Shaw by a grant of immunity.

Conclusion

In summary, the method by which the government and court obtained the testimony of Jones and Shaw constituted a violation of due process in two ways: (1) it created a strong incentive to give false and biased testimony against petitioner, and (2) it deprived the jury of the knowledge

of facts–the rewards finally bestowed on the witnesses in exchange for their testimony–that were essential to the complete and accurate evaluation of the credibility of these witnesses. This Court should not sanction the use of the awesome powers of the government to create a setting for false or biased testimony. Nor should this Court sanction that procedure of delayed sentencing which necessarily deprives the jury of facts essential to its determination of the weight to be given particular evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

JOSEPH A. BALL

ANTHONY MURRAY

ROBERT E. AITKEN

Counsel for Petitioner

Appendix:

Opinion of the court below.

APPENDIX

From the Office of the Clerk, United States Court of Appeals for the Ninth Circuit, U. S. Court of Appeals and Post Office Building, 7th & Mission Streets, P. O. Box 547, San Francisco, California 94101.

Re: No. 72-1694 USA vs. JAMES LEE STOCKWELL

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 1-11-73 Affirmed etc. the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Dennis R. Mathews,

Clerk of Court

OPINION OF THE COURT BELOW

In the United States Court of Appeals, for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellee, v. JAMES LEE STOCKWELL, Appellant.

NO. 72-1694.

[Filed January 11, 1973]

Appeal from the United States District Court for the Central District of California.

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and SKOPIL, District Judge.*

GOODWIN, Judge:

The only substantial question in this appeal from a counterfeiting conviction is whether the sentence was lawfully imposed.

Before trial, the district judge told the defendant that if he were to plead guilty to one count he would receive a three-year sentence, as did a codefendant who pled guilty. The court added that if the defendant chose to stand trial and was convicted he would receive a sentence of from five to seven years. The defendant elected to stand trial. He was convicted and given concurrent sentences of seven years for the five counts of which he was guilty. The total sentence could have been as much as fifteen years on one of the counts,

*The Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, sitting by designation.

with consecutive sentences on the others. There is no question but that the sentence was well within the statutory range of penalties, and ordinarily it would not be subject to review in this court. *See, e.g., Gollaher v. United States,* 419 F.2d 520, 529-530 (9th Cir.), *cert. denied,* 396 U.S. 960 (1969).

Here, however, the defendant contends he was punished with four additional years in prison for taking the court's time with a trial. While we do not believe that the experienced trial judge actually punished the defendant for standing trial, the record leaves unrebutted the inference drawn by the defendant.

If there was such a use of the sentencing power, the constitutional right to trial would be impaired. *See Baker v. United States,* 412 F.2d 1069,1073 (5th Cir. 1969), *cert. denied,* 396 U.S. 1018 (1970); *United States v. Wiley,* 278 F.2d 500 (7th Cir. 1960).[1] The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an appeal that arises when a defendant appeals, is reconvicted on remand, and receives a greater punishment. *See North Carolina v. Pearce,* 395 U.S. 711 (1969).

We recognize the variety of considerations that can bear upon a sentence. A genuine admission of guilt may properly result in a lighter sentence than would be appropriate for an intransigent and unrepentant malefactor.

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1 We express no opinion on that portion of the decision in *United States v. Wiley,* 278 F.2d 500 (7th Cir. 1960), that might be thought to imply that disparities in the sentencing of codefendants are, ipso facto, subject to appellate review. Like our colleagues on the Seventh Circuit, however, we believe that "[o]ur part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful * * * ." 278 F.2d at 504.

See, e.g., Gollaher v. United States, 419 F.2d at 530. However, courts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice.

Accordingly, once it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty. *See generally* A.B.A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Pleas of Guilty* § 1.8, at 36-37 (1968).

Other points urged on appeal are without merit. The judgment of conviction is affirmed, but the cause is remanded for resentencing.

Remanded.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on FEBRUARY 5, 1973, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Stockwell v. United States of America) on the following named parties by depositing TWO COPIES thereof and THREE COPIES thereof as designated below, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

THE SOLICITOR GENERAL OF THE UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20520 THREE COPIES

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
U. S. COURTHOUSE - 12TH FLOOR
LOS ANGELES, CALIF. 90012 TWO COPIES

I declare under penalty of perjury that the foregoing is true and correct.

Executed on FEBRUARY 5th, 1973, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161